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83-486

No. ———

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

———

EDDIE THOMPSON, JR.,

Petitioner-Plaintiff,

vs.

BERNARD MOORMAN,
KENTON COUNTY BOARD OF ELECTION,
A. T. WOOD,

Respondents-Defendants.

———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

———

EDDIE THOMPSON, JR., Pro Se
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CERTIFICATE OF SERVICE:

I hereby certify that 3 copies of the foregoing Petition have been served by the United States mail this ..... day of September 1983, upon: Mr. Martin J. Huelsmann, Assistant Kenton County Attorney, City-County Building, Covington, Kentucky 41011.

.....

EDDIE THOMPSON, JR.

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTIONS PRESENTED

1. Is a candidate's (for public office) constitutional rights (14th and 15th Amendments) violated when candidate's opponent and others conspire; (1) to influence voters, and; (2) to intimidate and illegally criminally prosecute candidate, because of said candidate's color, creed, race and/or sex?
2. Whether this case meets the "rare exception" criteria set out in Colorado River Supra, 424 U.S. 800.
3. Where federal court has jurisdiction, is federal court required to decide cases on the merits?

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A. T. WOOD,

Respondents-Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Eddie Thompson, Jr. respectfully prays that a Writ of Certiorari issue to review the Judgment and/or Order (Unpublished Decision) of the United States Court of Appeals for the Sixth Circuit, entered in the above styled case on April 20, 1983.

OPINION BELOW

The Order of the Court of Appeals, affirming the District Court, is annexed to this Petition as App. A, this App. P. 1a. The Order denying Petition for Rehearing is annexed as Appendix B, this App. P 8a. The Mandate issued on August 2, 1983, Exhibit A, this App. P. 1a.

The Order of the District Court denying attorney fees is annexed as Appendix C, this App. P. 9a.

The Order and Judgment of the District Court is annexed as Appendix D and E, this App. P. 11a, 12a; Order setting trial date is annexed as Appendix F, this App. P. 14a.

JURISDICTION

The Order and/or Judgment of the Court of Appeals is annexed to this Petition as Appendix A, this App. P. 1. A timely-filed Petition for Rehearing was denied on July 25, 1983, Appendix B, this App. P. 8a. This Petition for Certiorari was filed within sixty (60) days of the Petition for Rehearing having been denied.

The Court's jurisdiction is invoked pursuant to 28 U.S.C.A. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in pertinent part that, "No persons shall be . . .; nor be deprived of life, liberty, or property, without due process; nor shall private property be taken for public use, without just compensation.

Pertinent parts of the Fourteenth Amendment provide that, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

FIFTEENTH AMENDMENT: Sec. 1 – The right of

citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

42 U.S.C. 1983 provides, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

STATEMENT

The instant action seeks declaratory and injunctive relief and damages for alleged conspiracy to commit improper and unlawful acts against plaintiff in the November 1979 mayoral election because plaintiff was a Negro.

This case arises out of an alleged conspiracy to deprive Plaintiff of equal privileges and immunities under the law, and due process of law as guaranteed by the 14th and 15th Amendments to the United States Constitution, in a municipal election because Plaintiff is a Negro.

As a result of Plaintiff's efforts to participate in the election process, Plaintiff was harassed, intimidated, jailed, and threatened by Defendants (and others working on behalf of Defendant Moorman).

The facts of the case are not in dispute, and jurisdiction is conceded by the Courts below.

On July 7, 1981, the Court set this matter for trial on August 10, 1981, 9:30 A.M. (CAP App. P. 26, Rec. NR 12).

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* CAP App. refers to appendix filed in Court of Appeals.

On August 4, 1981, Counsel for Defendants filed an untimely motion to dismiss (CAP App. P. 35, Rec. NR 18).

On August 5, 1981, Honorable David S. Porter, sitting by designation, ordered the trial on August 10, 1981, to commence at 1:00 P.M., instead of 9:30 A.M. (CAP App. P. 40, Rec. NR 19), this App. P. 14a.

On August 6, 1981, (pursuant to Defendants' untimely motion) the District Court dismissed Plaintiff's cause (CAP App. P. 41, Rec. NR 20), this App. P. 12a, on the basis of *Buford* v. *Sun Oil, Supra,* 319 U.S. 315, 317-318.

In a later order the District Court said, "This Court's order dismissing this action on grounds of abstention express no opinion as to the merits of either Plaintiff's state law or his federal law claims." Rec. NR 25, this App. P. 12a.

The Court of Appeals made a mistake of fact and law, when it said, ". . . Thompson essentially has two central complaints: (1) that it was publicized that there were warrants issued for his arrest which were to be executed at or near election time as a result of his failure to pay a validly-assessed cost for criminal trespass . . ." Order, Court of Appeal this App. P. 2a.

That raises the question of whether one (Petitioner) can be legally prosecuted for an alleged criminal trespassing at one's (Petitioner) own home (after the statutory time for prosecuting the alleged criminal trespass) to aid one's (Petitioner's) opponent in a municipal election, because of one's (Petitioner's) color, creed, race, religion or sex, etc.

The gist of that portion of Petitioner's complaint were (1) ". . . that in order to aid Moorman in the November 1979 mayoral election, Judge Douglas Stephens, on his

own Motion, set a trial for September 13, 1979 on a 14-month-old criminal trespass charge brought by criminal lawyer Richard Slukich.; (2) that the holding of the trial was in violation of K.R.S. 500.050 (2), (3) and that Mr. Wood was so certain that Judge Stephens would jail Thompson on September 13, 1979, that he (Mr. Wood) wilfully failed to notify Thompson of the drawing on September 14, 1979 for position on the ballot. SEE Complaint NR 1, CAP App. P. 4-15, this App. P. Ex. A, A-1. (We may note that Mr. Wood was a witness for the State in the Criminal trespass case. We may also note that the Alleged Criminal trespass took place at Petitioner's home. SEE Supreme Court Case #82-2122.)

In affirming, the Court of Appeals said, "We believe that the District Court's reliance on *Buford* v. *Sun Oil Co.* is misplaced. . . . We affirm the District Court's dismissal, however, on the basis of *Colorado River Supra* 424 U.S. 800. This App. P. 5a.

Reason for Granting Writ

Courts and scholars alike, have struggled to define and explain the abstention doctrine which permits federal courts to avoid deciding cases over which they have jurisdiction.

The Doctrine in *Colorado River Supra* was recently clarified by this Court in *Moses H. Cone Memorial Hospital* v. *Mercury* (1983) 74 LEd 2d 765.

Albeit, "It was never a doctrine of equity that the federal court should exercise its judicial discretion to dismiss a suit merely because a state court could entertain it." *Colorado River Supra* 424 U.S. 800, 813. SEE also *Monroe* v. *Pape* 365 U.S. 167.

"Mere pendency of action in state court at time similar action is filed in federal court is not a bar to the federal

action nor a proper basis for the federal court to dismiss the complaint on grounds of abstention." *Strode Publishers, Inc.* v. *Holtz* 665 F 2d 333 (1982 7th Cir.).

In *Moses H. Cone Memorial Hospital Supra* this court noted that many of the factors militating in favor of abstention in *Colorado River* were missing, but that additional factors existed which counterbalanced any abstention argument. This court further noted, "It is highly questionable whether this court would have approved a dismissal of a federal suit in *Colorado River* (or in any of the abstention cases) if the federal court did not remain open to a dismissed plaintiff who later demonstrated the inadequacy of the state forum.

Of course, based on the foregoing theorem (*Moses H. Cone Memorial Hospital Supra* 74 LEd 2d 765) we must ask ourselves: (with the county attorney, who is illegally representing Defendant Moorman [K.R.S. 120.025], illegally prosecuted Plaintiff [K.R.S. 500.050 (2)], and would represent Defendant in state court) do we think Plaintiff would be adequately represented in state court?

We think not.

The questions presented by this case, inter alia, concern the effects and efforts of the same or similar suit being filed in Federal and State courts and its effect upon the jurisdiction of the Federal court. *42 U.S.C. 1983 and 28 U.S.C. 1343 (3)*.

In *Reynolds Supra,* 377 U.S. 533 this court recognized that, ". . . other rights, even the most basic are illusory if the right to vote is undermined (by sophisticated . . . or . . simple minded modes of discrimination)."

"Protection of Federal statute, which create a cause of action against persons who conspired to deprive any persons or class of persons of equal protection of the laws or of equal privileges and immunities under the law,

reaches clearly defined classes such as supporters of a political candidate. *Cameron* v. *Brock* 473 F 2d 608, 610.

The Fourteenth and Fifteenth Amendments to the United States Constitution secure freedom from discrimination on account of race in matters affecting the franchise. The theory of Appellant's action is that the Appellees, acting under color of state law, conspired to control the outcome of a state election by committing the allegations in the Complaint. SEE Compl. REC NR 1, CAP App. P. 4, 5, and 11, No. 12. No. 14, No. 20, No. 24. Also SEE Ex. A, A-1, B, and C Annexed.

"It has been established in recent years that the equal protection clause confers the substantive right to participate on an equal basis with other qualified voters whenever the state has adopted an electoral process for determining who will represent any segment of state's population." *Lubin* v. *Panish* 415 U.S. 709, 713.

"Restrictions on access to the electoral process must survive exacting scrutiny." *Buckley* v. *Valeo* 424 U.S. 1, 94.

The 6th Circuit Court of Appeals held in *Anderson* v. *Celebreeze* (1981) 664 F2d 554, 560: Ballot access are not susceptible or easy analysis, nor is the appropriate standard of review always easy to discern . . . Limitation on state power . . . is that the power may not be exercised in a way that violates other express provisions of the Constitution. Our problem began with what appeared to be a simple election contest in 1975; *Thompson* v. *Kenton County Board of Election* 535 S.W. 2d 68.

Thus (our) the problem is therefore capable of repetition, yet evading review. *Moore* v. *Ogilivie* 394 U.S. 814, 816.

Constitutional rights would be of little value if they could thus indirectly be denied. *Smith* v. *Allright* 321 U.S. 649, 664.

"The basis of this action is inequality of treatment though under color of law, not denial of right to vote. Compare *Nixon* v. *Herndon* 273 U.S. 536, 540 . . . Preliminary objection to the maintenance of this action is likewise untenable. To vindicate his present grievance the plaintiff did not have to pursue what remedy may have been open to him in the state court . . . cite omitted . . . Restort to a federal court may be had without first exhausting the judicial remedies of states courts . . . cite omitted. We therefore cannot avoid passing on the merits of plaintiff's constitutional claims. The reach of the Fifteenth Amendment against contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color, has been amply expounded by prior decisions . . . cite omitted. The Amendment nullified sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the color race, although the abstract right to vote may remain unrestricted as to race." *Lane* v. *Wilson* 307 U.S. 268, 274, 275.

Citizenship of the United States would be little better than a name if it did not carry with it the right to . . . (vote) . . . and the benefits, advantages, and opportunities to accrue to citizens therefrom. *Hague* v. *C.I.O.* 307 U.S. 496, 513.

Duncans v. *Poythress* 657 F2d 691, *Moore* v. *Ogilivie* 394 U.S. 814, 818 and *Reynolds* v. *Sims* 377 U.S. 533, 555 teach the right of suffrage cannot be denied by a *debasement* or dilution.

Webster Dictionary says to debase is to lower in esteem by verbal attack, disparity, vilify, done to show marked differences between, to make morally despicable or abhorrent, to defame or to utter or publish slander.

It is well settled that "certain discriminatory practices so infest processes of law as to be stricken down as invalid apart from demonstrated injury or inabiliy to do so." *Bell* v. *Southwell* 376 F 2d 659, 663 5th Cir. (1967), *Anderson* v. *Martin* (1964) 375 U.S. 399.

It is well settled that in a complaint alleging facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment and satisfying the requirements, it is no answer that the state has a law which if enforced would give relief; the federal remedy is supplementary to state remedy and the state remedy need not be first sought and refused before the federal one is involved. *Monroe* v. *Pape* 365 US 167, 5 LEd 2d 492, 81 Sct 473.

It is true that, after a post-abstention determination and rejection of his federal claim by the state court, a litigant could seek direct review in the U.S. Supreme Court. *N.A.A.C.P.* v. *Burton* 371 US 415, 9 LEd 405, 83 Sct 328, *Lassiter* v. *Northampton County Board of Elections* 360 US 45, 3 LEd 2d 1072, 79 Sct 985.

But such review, even when available by appeal rather than only by discretionary writ of certiorari, is an inadequate substitute for the initial district court determination to which litigant is entitled to in federal court . . . . some litigants have long purse string; many, however, can hardly afford one law suits, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice. The pursuance of justice is not an academic exercise. There are no foundations to finance the resolution of nice state law questions involved in federal court litigation. The parties are entitled – absent unique and rare situations – to adjudication of their rights in the tribunals which congress has

empowered to act. *England* v. *Louisiana Medical Examiners* 375 U.S. 411.

Mr. John Elfers', Kenton County Attorney, representation of Mr. Bernard Moorman (the candidate) is obviously in violation of the State Corrupt Practice law K.R.S. 120.025, but more important, Mr. Elfers' representations are under color of state law and give credence to the conspiracy and discriminatory practices of defendants. It is well settled that "under the Corrupt Practice Act, election of successful candidate may be declared void for violation of provisions of the Act, and it is not necessary to allege that results of election was affected by such violation. *Sparks* v. *Boggs* 339 S.W. 2d 480 (1960) Ky, *Kluemper* v. *Zimmer* 240 Ky 225, 41 S.W. 2d 1111.

Traditionally, the black man's political impotence was accompanied by discrimination and degradation in practically every aspect of life. One of the effective barriers to the exercise by Negroes of their constitutional rights was the fear of reprisal.

Judicial decisions describe how three civil rights workers, who were in the south to encourage blacks to register, were lynched a few days prior to the enactment of U.S. Civil Rights Act of 1964, SEE *Posey* v. *U.S.* 416 F 2d 545 (5th Cir.) ; how the Registrar of Walthall County, where no blacks were registered, pistol-whipped a civil rights worker who had brought two elderly Negroes to register, and then had the victim arrested for breach of the peace, *U.S.* v. *Wood* 295 F 2d 772; how the sheriff of Rankin County and his deputies brutalized young blacks while they were attempting to register, *U.S.* v. *Edwards* 333 F 2d 575; how a Negro, who had led registration efforts in Holmes County, was charged with the crime of fire bombing his own home by a sheriff who had previously

proclaimed that no black would vote in the county during his tenure in office, *U.S.* v. *Holmes County, Miss.* 385 F 2d 145.

Mr. Wood, County Clerk, has openly refused nomination papers of black candidates, and when blacks have succeeded in filing for office, he has tampered with the returns (ballots). Every state official, high and low, is bound by the Fourteenth Amendment. *U.S.* v. *Raines* 362 US 17, 25 4 LEd 2d 524, 80 Sct 519.

The Civil Rights Act of 1957 authorized the Attorney General to initiate suit in federal court for injunction and other relief against discrimination or intimidation in the electoral process. The opponents of equality have resisted the Civil Rights Act of 1957, reasoning that when someone claims denial of his rights, it was up to him and not the government to seek redress in the courts, that the government was not the "real party in interest." In Raines 362 US 17, the court found that the Attorney General had standing to sue; and rightfully so.

Moreover, the federal government could not be falsely jailed, run out of town, or lynched by those intent on perpetuating a discriminatory status quo, as exists here.

It seems clear that a Federal Court may not abdicate its authority on the grounds that a similar action is pending in a State court. *Donovan* v. *Dallas* 377 U.S. 408, *General Atomic Co.* v. *Felter* 434 U.S. 12.

CONCLUSION

The efforts of Defendants have successfully prevented Plaintiff and other Blacks from participating as candidates in local elections because of their race and/or religion, etc.

While it is true that the term for which Petition ran expires December 31, 1983, this Court should not permit the continuing contravention of Petitioner's and others Constitutional rights.

Truly, other rights, even the most basic are illusory if due process and equal protection clause of the 14th and 15th Amendments are debased, denied and/or diluted.

WHEREFORE, this Court should grant Petitioner declaratory and injunctive relief as prayed for in the Complaint.

Respectfully,

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EDDIE THOMPSON, JR., Pro Se

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 81-5641

EDDIE THOMPSON, JR.,

Plaintiff-Appellant,

v.

BERNARD MOORMAN, et al.,

Defendants-Appellees.

ORDER

(Filed August 4, 1983)

Before: KENNEDY and JONES, Circuit Judges, and GILMORE, District Judge.*

Plaintiff-appellant, Eddie Thompson, appeals from an order of the district court dismissing his complaint filed pursuant to 42 U.S.C. § 1983. We affirm the basic dismissal of the complaint, with directions to the clerk of the district court to amend the docket so that it reflects a dismissal *without* prejudice.

On November 13, 1979, Thompson filed two law suits identical in words and content, one in the United States

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* The Honorable Horace W. Gilmore, United States District Court for the Eastern District of Michigan, sitting by designation.

District Court for the Eastern District of Kentucky, and the other in the Kenton County Circuit Court of Kentucky. The complaints sought to charge the appellees, Bernard Moorman, the Kenton County Board of Elections, and A. T. Wood, with a conspiracy under 42 U.S.C. § 1983. Thompson claimed that the three had conspired to deprive him of "equal privileges and immunities under the law as guaranteed by the Fourteenth Amnedment to the U.S. Constitution, in a municipal election because plaintiff is a Negro." Thompson essentially has two central complaints: (1) that it was publicized that there were warrants issued for his arrest which were to be executed at or near election time as a result of his failure to pay a validly-assessed cost for criminal trespass, and (2) that he believes his opponent and those in charge of the election process violated the state statutes and regulations regarding elections.

Thompson sought an order declaring Bernard Moorman's election as mayor of Covington null and void, an order directing the Kenton County Board of Elections to issue a certificate of election to Thompson, an order requiring the Board of Elections to follow the Kentucky election statutes, an order permitting Thompson to inspect the voting machines, and some $20,000 in compensatory and punitive damages.

Once these complaints were filed, the defendants filed a motion to dismiss the federal claim. The motion was filed pursuant to Federal Rule of Civil Procedure 12 (b) (1) for a lack of subject matter jurisdiction and 12 (b) (6) for failure to state a claim upon which relief can be granted. Two days later, the motion was granted. The district court's order did not address the 12 (b) (6) motion and, instead, was based upon a determination that ab-

stention from federal jurisdiction was appropriate. Though the memorandum order merely stated that the complaint was to be dismissed, the docket entry reflected that the dismissal was with prejudice.

The trial judge, reading the complaint as a whole, construed it as, in essence, a state law challenge to the propriety tof the mayoral election. First, the court found that the state's substantial interest in the control and administration of the electoral process, and its extensive regulation of that process, justified dismissal of the case. The trial judge reasoned that the proper administration of state election laws was a matter of state concern and that the federal district court should not therefore interfere with the state's efforts toward a coherent system of policy-making and review. Accordingly, the district court dismissed the complaint, finding that the case was appropriate for the kind of abstention permitted under *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 333-34 (1943); *see also*, Wright, Miller and Cooper, *Federal Practice and Procedure* § 4244 (1978).

The trial judge also found that Thompson's filing of the same action in state court had made the federal case repetitious and wasteful, further justifying dismissal. The court found that the fact that the action paralleled that filed in state court and that the state court was the more appropriate forum for resolving the issues, in conjunction with the policies of avoiding duplicative litigation, avoiding friction between state and federal courts, and of promoting the efficient use of judicial resources, weighed heavily against the court's exercise of subject matter jurisdiction. *See Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655 (1977); *Colorado River Water Conservation District* v. *United States*, 425 U.S. 800 (1976); Wright, Miller

and Cooper, *Federal Practice and Procedure* § 4247 (1978).

In *Burford* v. *Sun Oil Co., supra*, the Supreme Court noted:

> Although a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion, whether its jurisdiction is invoked on the ground of diversity of citizenship or otherwise, refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest; for it is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.

319 U.S. at 317-18. Although the language used broadly addressed itself to matters of state "domestic policy," the doctrine of *Burford* abstentionism was, on the facts of that initial case, and has been since, largely limited to situations in which there were detailed state regulatory or administrative rules *and* procedures governing the subject matter of the federal suit. *See, e.g., Levy* v. *Lewis*, 635 F.2d 960 (2d Cir. 1980); *Allstate Insurance Co.* v. *Sabbagh*, 603 F.2d 228 (1st Cir. 1979). In addition, it appears that the Supreme Court has attempted to limit *Burford* abstentionism to cases in which there has been "presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976).

In the instant case, there are no state administrative procedures, nor are there special state judicial bodies established to resolve disputes arising under the election

laws. The mere presence of state legislation does not, standing alone, warrant abstention; diversity jurisdiction would be meaningless under such an approach. Accordingly, we believe that the district court's reliance on *Burford* v. *Sun Oil Co.* is misplaced.

We affirm the district court's dismissal, however, on the basis of *Colorado River Water Conservation District* v. *United States, supra.* There, the Supreme Court held that even where none of the other abstention categories applied, federal courts ought to refuse to decide cases when considerations of "[w]ise judicial administration giving regard to conservation of judicial resources and comprehensive disposition of litigation" require abstention. 424 U.S. at 817. Generally, this doctrine has been applied where there have been clear parallel actions filed in state and federal court. *See Levy* v. *Lewis, supra.*

This doctrine has been recently clarified by the Court in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 51 U.S.L.W. 4156 (Feb. 23, 1983). The Court noted that the decision whether to dismiss a federal action because of parallel state court litigation should rest on a careful case-by-case balancing "of the important factors as they apply in a given case with the balance heavily weighted in favor of the exercise of jurisdiction." 51 U.S.L.W. 4160. The factors militating in favor of abstention in *Colorado River* included (1) the clear federal policy of avoidance of piecemeal adjudication of water rights in a river system, (2) the absence of any substantial progress in the federal court litigation, (3) the presence in the suit of extensive rights governed by state law, (4) the geographic inconvenience of the federal forum, and (5) the government's previous willingness to litigate similar suits in state court. *Id.* In *Mercury Construction*

Corp., the Court concluded that not only were many of the *Colorado River* factors missing, but that additional factors existed which counterbalanced any abstention argument: (1) a strong federal policy in favor of arbitration which needed to be implemented; (2) the fact that federal law provided the rule of decision on the merits; and (3) the inadequacy of the state court proceedings in protecting the respondent's rights.

The present case is far more analogous to *Colorado River* than to *Mercury Construction Corp.* There are no strong federal policies and clearly no federal rules of decision which would control the resolution of the state election law complaints in this case. In addition, there is no indication that the state proceedings will inadequately protect the appellant's interest under state law. On the other hand, there has been no substantial progress in the federal litigation, the rights governed by state election law lay at the heart of these complaints and there is a clear danger of piecemeal litigation on the exact same issues should the two cases proceed. Moreover, there is no doubt in this case regarding the appellant's willingness to litigate issues in state court. Thompson filed *both* petitions himself.

Though abstention under *Colorado River* appears to have been appropriate, dismissal with prejudice is *not*. In *Mercury Construction Corp.*, the Supreme Court noted:

> It is highly questionable whether this Court would have approved a dismissal of a federal suit in *Colorado River* (or in any of the abstention cases) if the federal courts did not remain open to a dismissed plaintiff who later demonstrated the inadequacy of the state forum.

51 U.S.L.W. at 4163.

Accordingly, though the dismissal is hereby AFFIRMED, the docket entry is to be amended to reflect a dismissal without prejudice.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

ISSUED AS MANDATE: AUGUST 2, 1983
COSTS: NONE

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By Audrey Crockell, Deputy Clerk

APPENDIX B

No. 81-5641

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDDIE THOMPSON, JR.,
Plaintiff-Appellant,

v.

BERNARD MOORMAN
KENTON COUNTY BOARD OF ELECTION
A.T. WOOD,
Defendants-Appellees.

ORDER

(Filed July 25, 1983)

Before: KENNEDY and JONES, Circuit Judges and GILMORE, District Judge.*

The petitioner has filed a motion for a rehearing and suggestion for rehearing en banc in the above-styled case. A majority of the active Judges of this Court have not favored a rehearing en banc and the motion was, thus, referred to the original panel. Upon consideration of the petitioner's request, the panel has noted nothing of substance which was not carefully considered before issuance of the court's order. Accordingly, the motion for rehearing is hereby DENIED.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN

---

* The Honorable Horace W. Gilmore, United States District Court for the Eastern District of Michigan, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON, KENTUCKY

NO. CIV. 79-115

EDDIE THOMPSON, JR.

Plaintiff,

v.

BERNARD MOORMAN, et al.,

Defendants.

ORDER

(Filed September 21, 1981)

This action is presently before the Court on defendants' motion for attorney's fees pursuant to 42 U.S.C. §§ 1988, 2000e-5 (k) (doc. 24). There has been no memorandum *contra* filed.

Ordinarily, "a district court may in its discretion award attorneys' fees to a prevailing defendant [only] upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." *Christianburg Garment Co.* v. *E.E.O.C.*, 98 S. Ct. 694, 700 (1978). In other words, a defendant, in order to recover attorney's fees of the plaintiff, must establish two things: (1) that defendant has "prevailed" in the action; and (2) that the action was "frivolous, unreasonable or without foundation." Based upon this standard,

the Court determines that, in this case, the defendants' motion for award of attorney's fees should be denied. First of all, defendants have cited the Court no authority for the proposition that a defendant prevails when a case is dismissed on the ground that it presents a question more appropriately determined by the state judiciary. This Court's order dismissing this action on grounds of abstention expressed no opinion as to the merits of either plaintiff's state law or his federal law claims. It held only that plaintiff's state law claims so predominated over his federal law claims that this Court should decline to exercise its jurisdiction.

Thus, the Court has made no finding, and does not now find that plaintiff's action was frivolous, unreasonable or groundless. Although the Court declines to award attorney's fees in this case, the plaintiff would be well advised, in light of the substantial number of federal cases he has commenced and had dismissed against him, to think carefully before commencing any future action in this Court that might be deemed to be frivolous.

Accordingly, defendants' motion for award of attorney's fees is denied.

So ordered.

/s/ DAVID S. PORTER
United States Senior District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL ACTION NO. 79-115
EDDIE THOMPSON, JR.

Plaintiff,

vs.

BERNARD MOORMAN, ET AL

Defendants.

JUDGMENT

(Filed August 19, 1981)

For reasons stated in the order filed August 6, 1981,

IT IS ORDERED AND ADJUDGED that the complaint be, and hereby is, dismissed with prejudice, at the cost of the plaintiff herein.

This 19th day of August, 1981.

/s/ DAVID S. PORTER

HON. DAVID S. PORTER, U.S. District Judge
Sitting by Designation for Hon. William O. Bertelsman

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL ACTION NO. 79-115

EDDIE THOMPSON, JR.

Plaintiff,

v.

BERNARD MOORMAN, ET AL

Defendants.

ORDER

(Filed August 6, 1981)

In this action plaintiff alleges that his civil rights, specifically citing 42 U.S.C. §§ 1983, 1985 and 1986, were violated by certain municipal and county officials who were acting in violation of various Kentucky election statutes. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1343 (3). The acts complained of arose out of the November, 1979 mayoral election in Covington, Kentucky in which plaintiff was an unsuccessful candidate. On the same day plaintiff filed the complaint in this action he filed an identical complaint in the Circuit Court for Kenton County, Kentucky. Now before this Court is defendants motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted (doc. 18).

We find the motion well taken on two grounds. First, Kentucky Revised Statutes chapters 116 through 121 set

up a plenary system of regulation of state, county, and municipal elections. Procedures for contesting elections allegedly marred by the type of corrupt practices complained of in this action are provided. KRS ch. 120. Bringing an action in the appropriate state circuit court is the designated means for initiating an election contest. KRS §§ 120.055, 120.155. The proper administration of state election laws is a matter of substantial state concern and it would be inappropriate for this Court to interfere with state efforts to establish a coherent system of policy making and review. Hence this Court should abstain from exercising its subject matter jurisdiction over this matter. *Burford* v. *Sun Oil Co.*, 310 U.S. 315 (1943); *see* Wright, Miller & Cooper, *Federal Practice and Procedure* § 4244 (1978).

Second, because this action is repetitive of an action filed in a state court and because the state court is a more appropriate forum for this action, the policies of avoiding duplicative litigation, avoiding friction between state and federal courts, and promoting efficient use of judicial resources weigh against exercise of this Court's subject matter jurisdiction in this action. *Colorado River Water Conservation District* v. *United States*, 425 U.S. 800 (1976); *see Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655 (1977); Wright, Miller & Cooper, *supra*, § 4247; Note, "Federal Court Stays and Dismissals In Deference to Parallel State Court Proceedings: The Impact of *Colorado River*," 44 U. Chi. L. Rev. 641 (1977).

For the foregoing reasons defendants' motion is granted. This action is hereby dismissed.

So ordered.

/s/ DAVID S. PORTER
Senior United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL ACTION NO. 79-115

EDDIE THOMPSON, JR.

Plaintiff,

vs.

BERNARD MOORMAN, ET AL

Defendants.

ORDER

(Filed August 5, 1981)

This case having been referred to Honorable David S. Porter, United States District Judge for the Southern District of Ohio, sitting by designation in the Covington Division of the Eastern District of Kentucky, and this case being set for trial on Monday, August 10, 1981, at 9:30 A.M.,

IT IS ORDERED that the case will remain scheduled for trial on the 10th of August, 1981, but the trial will commence at 1:00 P.M., rather than 9:30 A.M. The trial will take place in Covington, Kentucky.

This 5th day of August, 1981.

/s/ DAVID S. PORTER

HON. DAVID S. PORTER, U.S. District Judge
Sitting by Designation for Hon. William O. Bertelsman

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EX. A.

Mayoral candidates' trespass trial opens

SEPT 13, 1979

By Tom Loftus
Kentucky Post Staff Writer

A 14-month-old trespassing charge filed by criminal lawyer Richard Slukich against Covington mayor candidate Eddie Thompson Jr. was to begin today in Kenton District Court.

Thompson, 43, was arrested July 29, 1978 by Covington Police after Slukich complained Thompson was moving furniture into a house Slukich owns at 736 Highland Ave., Covington.

Slukich said in the complaint he asked Thompson what he was doing and Thompson answered, "moving in."

Blames bank

The matter actually dates back further to October of 1977 when Peoples Liberty Bank took possession of the house after Thompson had missed several monthly payments.

Thompson claimed the foreclosure was improper. Slukich later acquired the title through a public sale.

Thompson now lives with relatives at 629 Greenup St., but he still lists the Highland address as his home. He's listed as living there in the 1979 Covington City Directory. He listed 736 Highland as his residence last spring on his nominating petitions for mayor.

Thompson finished third in the primary, but will appear on the November ballot because former Commissioner Carl Bowman, who finished second, has withdrawn.

The trespassing charge went to trial about a year ago. But Kenton District Judge Douglas Stephens declared a mistrial because of "misconduct" by Thompson in making certain statements before the jury.

Stephens would not explain that order Wednesday because he is scheduled to preside at today's trial.

Thompson will act as his own attorney. Assistant County Attorney Kenneth Gilliam will prosecute. Slukich will be a witness.

Thompson Gets Another Day

NOV 1, 1977

BY BOB FOGARTY
Enquirer Reporter

Eddie Thompson Jr., unsuccessful candidate for mayor of Covington, heard part of the vote count Tuesday night in the Kenton County Clerk's office.

But Thompson, 43, a carpenter, left without being served either of two warrants calling for his arrest.

No one appeared particularly disturbed that the warrants weren't served.

"They've been kicking around in the courts for some time," said Sheriff Jim Crowell. "We owed him the respect to wait until the election was over."

Thompson was named in a contempt of court warrant issued Monday from Kenton Circuit Court. Judge James Gilliece ordered the warrant because Thompson didn't show up in response to a summons to give a deposition in a civil suit.

Three days earlier Thompson was named in a warrant from Kenton District Court. Judge Douglas Stephens had given Thompson until Friday to appeal or pay a $500 fine assessed by a district court jury.

Thompson was found guilty Sept. 13 of criminal trespass.

The verdict resulted from a charge the candidate for mayor had moved back to his former residence at 736 Highland Ave., Covington, which Thompson insisted was his. The property had been repossessed and sold.

Thompson has been living with relatives since leaving the Highland Avenue home.

He was unavailable for comment on the election or the warrants.

...ruby ... accumulation of trash

Mayor Candidate Given $500 Fine

Eddie Thompson Jr., 43, candidate for Covington mayor, was fined $500 and costs Thursday on a charge of first-degree criminal trespass.

Thompson acted as his own lawyer in a jury trial in Kenton District Court. Judge Douglas Stephens gave Thompson until November 4 to pay the fine.

Thompson was eliminated in the Covington primary election for mayor. However, the withdrawal of former Vice Mayor Carl Bowman moved Thompson's name into the November general election against City Commissioner Bernard Moorman.

Thompson said Thursday he hadn't plans to appeal his conviction for trespass.

The charge has been pending since July 29, 1978. It followed Thompson's move back into his former residence at 736 Highland Ave., Covington.

Thompson's home had been repossessed by Peoples Liberty Bank and Trust Co. and was sold to attorney Richard Slukich.

Thompson, a carpenter, said he has been living with relatives since leaving the residence.

A suit filed by Thompson in federal court blames various officials for his problems in Kenton County, including election losses in 1975 and 1977 city commission races.

First Offender Put In Diversion Plan

EXHIBIT A—Page 15a

The Kentucky Post

Friday, September 14, 1979

EX A-1

In business

Hughes said [illegible] parts of the city have drainage and basement flooding problems.

chlorine cylinder into the chlorinator ruptured," said operator

Taylor. Still firefighters tied off the line and the break was repaired

rupture.

for
mem

Mayor candidate found guilty

By David Wecker
Kentucky Post Staff Writer

Covington mayoral candidate Eddie Thompson Jr. was found guilty of trespassing and fined $500 by a six-member Kenton District Court jury Thursday afternoon.

The charge was filed by criminal attorney Richard Slukich 14 months ago after Thompson, 43, was found moving furniture into a house Slukich owns at 736 Highland Ave., Covington.

The house had been owned previously by Thompson. However, Peoples Liberty Bank foreclosed on the house in October, 1977, claiming Thompson had missed several monthly payments.

Refused money?

Thompson maintained the bank refused to accept payments he made. "They stopped taking my payments because I contested the results of the 1975 city commission election," said Thompson, a losing candidate in that race.

Acting as his own attorney, Thompson was admonished numerous times by Kenton District Judge Douglas Stephens to "stick to the relevant facts. Let's get back to the main question; that is, the charge against you."

Just as often, Thompson's line of questioning was interrupted by objections from Slukich's attorney, Ken Gilliam. All but a few objections were sustained.

Slukich did a slow burn under Thompson's questioning. "You broke into the house after you were ordered not to," Slukich told Thompson from the witness stand. "You changed the locks and you caused a lot of people a lot of problems.

"You're human, so you deserve consideration. But so do others. I only hope sometime, someplace that light comes on for you."

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EXHIBIT A-1—Page 16a

Mayor's race is no race at all EXB

By Tom Loftus
Kentucky Post Staff Writer

The Covington mayor's race is traditionally a no-holds-barred bare-knuckle brawl. And less than a year ago local political observers saw no reason why this year's race should be any different.

But as months passed, most of the heavyweight contenders fell by the wayside. Some were knocked out by innuendo, allegation and indictment. Others simply chose to watch from ringside.

What's left is a mismatch.

Bernie Moorman, a three-term commissioner with time-tested support, versus the previously unsuccessful commission candidate Eddie Thompson Jr.

Thompson, a 43-year-old carpenter, has tried to hammer away at Moorman's record, but it seems he's not drawn nearly enough blood to overcome Moorman's huge popularity displayed in the primary.

Moorman clobbered Thompson in the primary 3959 votes to 681. Thompson finished third, but was placed on the November ballot when second place finisher Carl Bowman withdrew.

Thompson is not about to concede, though.

"I think I'll win," Thompson says. "The people are becoming more aware of my opponent's record and coming to realize he might not be the better man. They see that he's refused to debate me on the issues."

Moorman acknowledges he declined a debate offer from Thompson three weeks ago. But Moorman rejects Thompson's conclusion that Moorman did so to avoid one-on-one confrontation at a public forum.

"Our positions on the issues are basically the same. There was nothing to debate," Moorman said.

Moorman, 41, 501 Garrard St., is a bachelor and a chemist for the Environmental Protection Agency. And perhaps true to his profession, he's campaigning in a deliberate, methodical, well-planned manner.

"I'm confident," Moorman said. "But I'm always worried about elections until they're over. Politics is a constantly fluctuating thing. And I've never been a candidate in a one-on-one race before."

Moorman is campaigning strictly *for* himself. He's not campaigning *against* Thompson. He speaks highly of Thompson, and refers to him as "Eddie."

Thompson calls Moorman "Moorman."

"I don't know if our opinions are the same or not," Thompson complains about Moorman's rejection of a debate.

"One thing I think we differ on is why they had to put assessments on the businesses along Old Town Plaza.

Election focus

for the improvements there," he said.

"I also have some different ideas on how our housing stock should be rebuilt, and I wanted to ask why our property taxes are so high."

"The main problem with these issues and every issue is that the commission and the department leaders aren't working together," Thompson said. "And they're not in touch with the business community. One of my first priorities would be to sit down with the business people and design a plan with them that will attract and develop business in the city."

Covington's troubles with the U.S. Department of Housing and Urban Development (HUD) stem from the city's lack of communication with HUD, Thompson says.

"The city committed itself to an Affirmative Action plan years ago and never lived up to it," said Thompson, the only black candidate on the local Covington ballot. "Now it's not their place to complain if HUD forces them to live up to those commitments."

Moorman admits the city dragged its feet in complying with its minority hiring guidelines. And he admitted that voting under HUD pressure to hire minorities over white candidates who scored higher on police and fire entrance tests was one of the most difficult votes of his six-year commission tenure.

"But I hope now most of that is behind us. It's about to the point where the federal people are running the city," Moorman said. "We haven't appealed any decisions to HUD in Washington yet, but if the pressure takes control of local affairs out of the commission's hands, we will."

Moorman says the most important issue to all of northern Kentucky is what he calls "the inevitable transition to area-wide government."

"They're incomplete. Because of their smallness they sacrifice much of their independence to quasi-governmental bodies like the TANK board, the sanitation and water districts, the health district, and Northern Kentucky Planning Commission, etc. There is no elected voice on these powerful boards," Moorman said.

Metro government is the answer, Moorman says, with a large board of commissioners—some elected by district, others at large.

Thompson lists annexation far down on his list of priorities, and says the city should address its attention to internal needs.

Thompson fails to appear at hearing

Covington mayoral candidate Eddie Thompson failed to appear at a hearing Friday where he was scheduled to explain why he hasn't paid a $500 trespassing fine.

Thompson was convicted by a jury on the charge last month. Kenton District Judge Douglas Stephens called the hearing after Thompson failed to pay the fine by the Oct. 4 deadline.

Stephens said if Thompson doesn't show next Friday, Stephens may issue a warrant for Thompson's arrest.

Thompson said in a telephone interview he did not appear and will not appear because, "Judge Stephens does not have the authority to force me to pay. I have appealed the conviction to Circuit Court and do not have to pay it."

Thompson's charge stems from a two-year-old complaint signed by attorney Richard Slukich. Slukich said Thompson illegally moved into a house Slukich owns at 736 Highland Ave., Covington. Slukich obtained title to the house after it was repossessed from Thompson.

Thompson has a suit pending challenging the legality of that repossession. Thompson still lists his address as 736 Highland Ave., but says he's staying with relatives at 629 Greenup, Covington.

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EXHIBIT B—Page 17a

Ky. Post

home edition

Tuesday, November 6, 1979

Votes won't bar Eddie from jail

Covington mayoral candidate Eddie Thompson Jr. will likely be celebrating victory or drowning his sorrows on election night in the Kenton County Jail.

Kenton Circuit Judge James Gilliece and Kenton District Judge Douglas Stephens both have issued warrants for Thompson's arrest for separate contempt of court matters.

Kenton Sheriff Jim Crowell said this morning. "We haven't been able to find Eddie yet, but we're sure he'll be down here at the courthouse tonight when they count the votes.

But first . . .

"We're going to let him finish with the vote counting, then, about 9 or 9:30, we'll arrest him and take him to jail. I don't think either judge would fault me for letting him finish with the counting." The first warrant was issued late Friday by Stephens because Thompson had failed to pay a $500 trespassing fine on time, and had failed twice to appear at court hearings to explain why he hadn't paid it.

Thompson was convicted of the charge two months ago by a jury in Stephens' court. Stephens said he issued the warrant because it was a criminal verdict returned by a jury, and he had given Thompson ample time to come up with the money.

Gilliece issued the second warrant Monday because Thompson didn't show for a deposition in a civil lawsuit. That suit stems from a three-car accident June 11, 1978, on Highland Ave. in Covington, involving a car owned by Thompson and driven by his daughter, Delores.

Gilliece said Thompson could avoid the charge if he gives the deposition. Stephens said he wants a hearing on Thompson's failure to pay the fine, even if he pays it before his arrest.

His own attorney

Thompson could not be reached for comment. A 43-year-old carpenter, Thompson represents himself in both cases.

Thompson lists his address as 736 Highland Ave., but admits he's been living elsewhere in Covington with relatives since evicted there two years ago. Thompson claims the eviction was illegal and has challenged it with a suit he filed himself.

He faces Covington Commissioner Bernie Moorman in today's mayor's race.

More inside...

E.X.C

Beehan paces nev

Moorman's huge win was apparent from early returns.

"Judging from the vote in the primary, I can't say I'm surprised. Flattered, but not surprized," Moorman said. "I'm eager to work with the new commission that will be chosen tonight."

Thompson appeared in the clerk's office for about 30 minutes Tuesday evening. "No, I'm not really surprised, but I'm going to reserve any comments until after today," Thompson said.

Thompson filed election-fraud suits after losing commission races in 1975 and 1977. "I'm taking notes here," Thompson said, indicating another suit is in the works. "I'm fact-finding. I'll determine my eventual actions later."

Deputies were prepared to serve Thompson with two arrest warrants, one for failing to pay a trespassing fine, the second for not appearing for a deposition. Sheriff Jim Crowell said, "He ducked out somewhere. We'll try to serve him tomorrow if we can't find him tonight."

EDDY GATE

police

Thompson To Be Jailed Today, Says Sheriff

Kenton County Sheriff James Crowell will try today to serve warrants sending Eddie Thompson Jr. to jail.

Thompson, 43, an unsuccessful candidate for mayor of Covington in Tuesday's election, is expected to appear when absentee ballots are counted and voting machines are checked, Crowell said.

The checking procedure is expected to last until late Friday. It will be conducted in the county garage, 40th and Glenn Sts.

Thompson was present a brief time during the vote count Tuesday night in the Covington-Kenton Municipal Building. However, Crowell's deputies did not try to serve either of two warrants outstanding against Thompson.

The warrants charge Thompson with not paying a $500 fine for criminal trespass and with contempt of court.

"We've been looking for him," Crowell said. He said Covington police also have alerted to find Thompson.

Thompson has lived with relatives since moving from his former home at 736 Highland Ave. He was convicted of trespassing in the home once it had been sold.

EXHIBIT C—Page 18a

1d

Office-Supreme Court, U.S.
FILED
OCT 21 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-486

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

EDDIE THOMPSON, JR.,

Petitioner-Appellant-Plaintiff,

vs.

BERNARD MOORMAN,
KENTON COUNTY BOARD OF ELECTION,
A. T. WOOD,

Respondents-Appellee-Defendants.

RESPONDENT'S REPLY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court and Sixth Circuit Court of Appeals error in dismissing this case under the Abstention Doctrine?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-486

EDDIE THOMPSON, JR.,

Petitioner-Appellant-Plaintiff,

vs.

BERNARD MOORMAN,
KENTON COUNTY BOARD OF ELECTION,
A. T. WOOD,

Respondents-Appellee-Defendants.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATUTORY AUTHORITIES

42 U.S.C. 1983 – Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress.

SUPREME COURT RULES

Sup. Ct. Rule 17 (1) — A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Sup. Ct. Rule 34 (6) — Briefs must be compact, logically arranged with proper headings, concise and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the Court.

KENTUCKY REVISED STATUTES

120.155. Contest of regular election of officers other than governor, lieutenant governor, general assembly member and certain city officers. — Any candidate for election to any state, county, district or city office (except the office of governor, lieutenant governor, member of the general assembly, and those city offices as to which there are other provisions made by law for determining contest elections), for whom a number of votes was cast equal to not less than twenty-five per cent (25%) of the number of votes cast for the successful candidate for the office, may contest the election of the successful candidate, by filing a petition in the circuit court of the county where the contestee resides, unless the officer is one elected by the voters of the whole state, in which case the petition shall be filed in the Franklin Circuit Court. The petition shall be filed and process issued within thirty (30) days after the day of election; it shall state the grounds of the contest relied on, and no other grounds shall afterwards be relied upon. The contestee shall file an answer within twenty (20) days after the service of summons upon him. The answer may consist of a denial of the averments of the petition and may also set up grounds of contest against the contestant; if grounds are so set up they shall be specifically pointed out and none other shall thereafter be relied upon by the party. Any candidate who would have been qualified to bring a contest action under this section, who is a party to a recount proceeding under KRS 120.185, may, by filing answer in the recount proceeding within the time allowed by the petitioner in the recount proceedings. A reply may be filed within ten (10) days after the answer is filed; its affirmative allegations shall be treated as controverted, and no subsequent pleading shall be allowed.

COUNTERSTATEMENT OF THE CASE

The petitioner brought this action against the respondents on November 13, 1979, charging the defendants with conspiracy under 42 U.S.C. 1983. Looking behind the words in the Complaint, it was merely an election contest case in which Thompson sought the aid of the Federal Court by allegations of conspiracy and race-motivated activities.

On the same date that Thompson filed the above suit in the Eastern District of Kentucky number 79-115, Thompson filed an identical suit in Kenton County Circuit Court numbered 79-CI-1776.

On August 4, 1981, the Appellees filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12 (b) (1) and (6). The Motion gave notice to the Plaintiff with the fact that the Motion was to be heard at the convenience of the Court. On August 6, 1981 Judge David S. Porter, Sr., United States District Judge, sitting by designation for Hon. William O. Bertelsman, granted the Motion. On August 19, 1981 the Judgment was entered pursuant to the Order of August 6, 1981. On September 21, 1981 Judge Porter denied a Motion by the Defendants for attorney fees.

On April 20, 1983 the Judgment of the District Court was Affirmed by the United States Court of Appeals for the Sixth Circuit although the docket entry was amended to reflect dismissal without prejudice.

On April 28 ,1983 Thompson filed a Petition for Rehearing and a suggestion for rehearing en banc. The Motion for rehearing was denied on July 25, 1983.

ARGUMENT

The Respondent must first assert that the Petitioner has subjected the Respondent to a frivolous appeal by including in this petition burdensome, irrelevant, immaterial, and scandalous matter in an attempt to cloud the issue of this case. Respondent therefore relies on Sup. Ct. Rule 34.6 and requests that this Petition be disregarded and stricken by the Court. Once again the Petitioner has introduced new items in the Petition for Writ of Certiorari.

In the brief for Appellant at page 4 the second last paragraph the Petitioner states:

> That raises the question of whether one (Petitioner) can be legally prosecuted for an alleged criminal trespassing at one's (Petitioner) own home (after the statutory time for prosecuting the alleged criminal trespass) to aid one's (Petitioner's) opponent in a municipal election, because of one's (Petitioner's) color, creed, race, religion, or sex, etc.

The Petitioner in this case has been to this court at least twice before. In 81-2178 the Petitioner had sued the same Mr. A. T. Wood for recording the deed to his former home. He apparently also was before this court in Case No. 82-2122 concerning the Criminal Trespass charges (Petitioner's brief page 5).

It is readily apparent that Mr. Thompson seeks to litigate and relitigate and relitigate on a pro-se basis.

Once again, the Petitioner sought to muddy up the waters by presenting the questions for the Court. The only question for the Court is did the District Court and Court of Appeals err in holding that this case should be dismissed under the Abstention Doctrine?

The Petitioner on November 13, 1983 filed two law

suits. The Petitioner filed both of these law suits pro se and the Court of Appeals stated:

> Moreover, there is no doubt in this case regarding the Appellant's willingness to litigate issues in State Court. Thompson filed BOTH petitions himself. (emphasis by the Sixth Circuit) (p. 5)

In both cases the petitioner stated in the Complaint the following:

> "25. That Plaintiff intends to have this Complaint filed in Kenton Circuit Court."

The Petitioner filed the Complaint in Federal Court solely for the purpose of asserting jurisdiction of the claim that is properly before the State Courts. See *Graf* v. *Barker,* 409 F. Supp. 571 (D.C., Wis., 1976). See generally Wright and Miller *Federal Practice and Procedure* § 1350 (1978).

The Complaint stated jurisdiction of the Federal Court pursuant to KRS 120.155 which clearly places jurisdiction in the Circuit Court of the County in which the contestee resides. Furthermore, it appears that the petitioner does not challenge the fact that State Courts have jurisdiction of the 1983 actions nor does he even mention in his brief that he filed a case in Kenton Circuit Court. Clearly states do have concurrent jurisdiction of 1983 actions. *Miever* v. *New York City Transit Authority,* 397 N.Y.S.2d 531 (1977), *Board of Education of Bellevue* v. *Rothfuss,* Ky., 639 S.W.2d 545 (1982).

The trial judge found the Motion to be well taken on two grounds. First, the Kentucky Revised Statutes chapter 116-121 set up a preliminary system of regulation of state, county and municipal elections. Thus the Court should abstain from exercising subject matter jurisdiction citing

Burford v. *Sun Oil Co.*, 310 U.S. 315 (1943); see Wright, Miller and Cooper, *Federal Practice and Procedure* § 4244 (1978).

The Court though went on to find the second reason in that the action is repetitive of the action filed in State Court and because the State Court was the more appropriate forum the policies of affording duplicative litigation, avoiding friction between State and Federal Courts, and promoting efficient use of judicial resources weighed against the exercise of this Courts subject matter jurisdiction in the action. The Court stated *Colorado River Water Conservation District* v. *United States*, 425 U.S. 800 (1976); *Will* v. *Calvert Fire Insurance Co.*, 427 U.S. 655 (1977) and other authorities.

The Sixth Circuit affirmed the dismissal on the basis of *Colorado River Conservation District* v. *United States* on the basis that it "(w)ise judicial administration giving regard to conservation of judicial resources and comprehensive disposition of litigation" required abstention. This doctrine has been applied when there have been clear parallel actions filed in State and Federal Court. *Levy* v. *Lewis*, 635 F.2d 960 (2nd Cir. 1980).

The Sixth Circuit reviewed the recent case of *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, —— U.S. ——, 103 S. Ct. 927, (1983). They noted that under *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.* the decision as to whether to dismiss a federal action should rest on a careful case-by-case balancing of the important factors as they apply in a given case. The Sixth Circuit found that the mitigating factors included:

1. The clear federal policy of avoidance of peace adjudication of water rights and river system.

2. The absence of any substantial progress in the federal court litigation.

3. The presence in the suit of extensive rights governed by state law.

4. The geographic inconvenience of the federal form.

5. The governments previous willingness to litigate similar suits in state courts.

The Sixth Circuit specifically found that the present case is more analagous to *Colorado River* than to *Mercury Construction Corporation*. The Court stated:

> There are no strong federal policies including no federal rules of decision which would control the resolution of a state election of law complaints in this case. In addition, there is no indication that the state proceedings will inadequately protect the appellant's interests under state law. On the other hand, there has been no substantial progress in the federal litigation, the rights governed by state election law lay at the heart of these complaints and there is a clear danger of peacemeal litigation on the exact same issues should the two cases proceed. Moreover, there is no doubt in this case regarding the appellant's willingness to litigate issues in state court. Thompson filed *both* petitions himself. (emphasis by court page 5.)

The Sixth Circuit went on to show that the dismissal with prejudice was to be changed to without prejudice in view of the fact that if the plaintiff had later demonstrated an inadequacy of the state form the federal courts would again be open. Clearly, the Court of Appeals was correct in their decision.

CONCLUSION

It is respectfully submitted that both the lower courts were correct in their decisions.

The Petition for Writ of Certiorari should be denied since it does not meet any of the tests under Supp. Ct. Rule 17 (1).

Respectfully submitted,

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